Office-Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1961

No. 870

CARL D. SCHAEFER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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INDEX

	PAGE
Opinion Below	2
Jurisdiction	2
Question Presented	3
Constitutional Provisions and Statutes Involved	4
Statement	4
Reasons for Granting the Writ	7
Conclusion	9

List Of Authorities

Holder v. U. S., 150 U.S. 91 (1893)	8
Holstein v. Green, 262 S.W. 2d 954 (Tex. Civ. App.)	8
Palmer v. People, 112 Ill. App. 527 (2d Dist. 1903)	8
People v. Duane, 21 Cal. 2d 71, 130 P. 2d 123	8
Pile v. State, 107 Tenn. 532, 64 S.W. 476 (1901)	8

Appendices

Appendix A—Opinion of Court of Appeals	1a
Appendix B—Places in Record where Krueger and Reed are mentioned	20a
Appendix C—Government witnesses — references to Krueger and Reed	22a
Appendix D—Amendment V, Constitution of the United States	23a

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Carl D. Schaefer prays that a writ of certiorari issue to review that part of the judgment of the United States Court of Appeals for the Seventh Circuit which was entered in this cause February 14, 1962, and which affirms convictions under counts three, six, eleven, and twelve of the indictment herein.

OPINION BELOW.

The opinion of the Court of Appeals, with dissent, is printed in the Appendix to this petition as Appendix A.

JURISDICTION.

The judgment of the Court of Appeals was entered on February 14, 1962, and a petition for re-hearing; which was timely filed, was thereafter denied on March 16, 1961. Jurisdiction of this court is invoked under 28 U.S.C. Sec. 1254(1).

QUESTION PRESENTED.

Background:

Carl D. Schaefer was convicted on all counts of a twelve count indictment; the charges were using the mails in connection with a securities fraud and mailing unregistered securities, 15 U.S.C. 77(q)(a)(1) and 15 U.S.C. 77e(a)(2). Six counts were reversed and two counts reversed and remanded. The convictions were affirmed as to four counts.

Schaefer is an inventor. He invented a novel steam generator which reduces heating and power costs considerably. The validity of the invention, its novelty and usefulness, are not disputed by the Government; nor was there any issue made at the trial that Schaefer had misused the moneys collected from investors. The entire Government case was that Schaefer claimed to investors that he had financial backing which he did not, in fact, have. Schaefer's defense was, that he did have the backing, in some cases, or that he believed he had it, in other cases.

The Government's fact witnesses were divided into two classes: those named in the indictment and those non-indictment witnesses who were used to testify that Schaefer had told them of corporations and individuals interested in his machine. The non-indictment witnesses were used to establish the scheme to defraud, and the indictment witnesses were used (as to counts three and six) to prove mailings in connection with the scheme.

At the trial, Defendant sought to call two witnesses named Krueger and Reed. The record indicates that these two men were known to most of the Government's witnesses, and that *the a*. Krueger and Reed, were deeply involved with the Defendant; one of them was his shop

assistant for many years, and the other was selling franchises for him. Most of the Government witnesses talked to Krueger and Reed. The trial court refused to allow them to testify because they had remained in the courtroom in violation of a rule imposed requiring *sequestration* of witnesses. The testimony was that they had been in the courtroom during some parts of the trial, but that they were elderly and deaf and heard little, if any, testimony.

On this petition, the question presented is:

4. Whether or not the exclusion of Reed and Krueger from the stand when called by the Defendant was reversible error requiring the award of a new trial to Defendant on those four of twelve counts upon which his conviction was affirmed.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

Constitution of the United States—Amendment 5. (Printed herein as Appendix D)—

STATEMENT.

The trial court, sitting without a jury, excluded two of Defendant's three fact witnesses from the stand because they had been in the courtroom during the taking of evidence. The trial court's order was as follows: (App. 58).

"Any and all witnesses in the case of United States of America v. Carl D. Schaefer who are in the court-

room are asked to leave the courtroom and go to the witness room which is just in back of the courtroom."

Reed and Krueger, the two excluded witnesses, were not shown to have been in the courtroom when the court made this order, and their testimony is that they were unaware of the rule and remained in the courtroom at various times in violation of this rule. The evidence was that Krueger was deaf and did not hear anything (App. 222). Reed, who was eighty-five years old, testified that he was also deaf and that he heard no testimony. (App. 226).

On appeal, Defendant argued that the trial court erred in excluding Reed and Krueger, and this argument was sustained as to two counts of the indictment, which were reversed and remanded, and not considered as to six counts, which were reversed without remandment for insufficiency of proof. The Court of Appeals held that this error did not affect the four counts upon which the conviction was affirmed because no offer of proof was made that would indicate what the testimony of Reed and Krueger would have been as to those counts.

The record reveals 51 page references to Krueger and 53 page references to Reed; most of these references were in the prosecution's case. A table of these record references is attached to this petition as Appendix B (and demonstrates their importance in the case). Krueger and Reed were closely associated with Schaefer for many years; Krueger was present when Schaefer talked to an alleged agent, and when Schaefer talked to most of the non-count witnesses used to establish a scheme to defraud. Reed also talked to some of those witnesses.

The question of the existence of the scheme to defraud was basic to the Government's case. To establish this scheme the Government called eleven witnesses, all but two of

whom talked to either Krueger or Reed or both; a greater part of the testimony adverse to Schaefer and relating to the scheme to defraud was of conversations which occurred in the presence of either Krueger or Reed. The trial court decided the issue of fact as to the existence of the scheme to defraud without hearing either of Schaefer's witnesses and then refused to believe Schaefer and convicted him. A table attached hereto as Appendix C lists the Government witnesses who were used to establish the scheme to defraud and whose testimony reveals that they heard the alleged misrepresentation in the presence of either Krueger or Reed. Only three of twelve did *not* talk to Reed or Krueger.

To the same effect Reed was present when Schaefer talked to a lawyer about the documents which he used in selling participations in his invention, but was excluded from the stand (App. 264), and brought Schaefer an important backer named Prentice (App. 244). Schaefer was denied Reed's testimony when it is apparent from the record that Reed saw and heard the same people that Schaefer saw and heard; the trial court disbelieved Schaefer, but did not hear his corroboration.

Schaefer's defense as to the charge of mailing unregistered securities, charged by counts eleven and twelve, was that the lawyer told him securities were not required to be registered, and Reed was his sole corroboration on this count, as the lawyer died some years prior to trial (App. 264). By the ruling of the trial court, Schaefer was denied corroboration of testimony that well might have established his defense of good faith.

REASONS FOR GRANTING THE WRIT.

Carl Schaefer stands faced with imprisonment on convictions held two-thirds defective by the Court of Appeals after a trial at which two out of his three fact witnesses were excluded from the stand. The Court of Appeals recognized the error committed by the trial court, and further recognized that the error, to be saved, did not require an offer of proof; however, after recognizing the great prejudice of such an error the Court was most parsimonious about allowing the Defendant a full new trial which might be held free from the error.

Defendant's entire defense was based on his own testimony and on the testimony of Banderob, Reed and Krueger. He was either acting with honest intent, as his own testimony indicated, or he was engaged in a scheme to defraud. The Government brought a parade of witnesses, and then, by a technical ruling, prevented Schaefer from putting on his own parade, consisting of Reed and Krueger. Reed and Krueger knew Schaefer and his work; they heard most of the conversations which made up the proof of the claimed scheme to defraud, and they knew what Schaefer had heard from the people upon whose words Schaefer based his claim of financial backing. The record shows, in short, that Krueger and Reed knew about all there was to know about Carl D. Schaefer, his invention, its backers, and its investors. The existence of honest intent in Carl Schaefer was the key issue before the trial court, and Reed and Krueger were the only men who could give direct testimony as to the entire scope of Schaefer's actions. To exclude them was a deadly wrong to fairness, and that wrong was not

made right when the Court of Appeals allowed the error in part and denied it in part.

The exclusion of these witnesses was contrary to the language of this court in *Holder v. U.S.*, 150 U.S. 91 (1893), in which case the court said (p. 92):

> "If a witness disobeys the order of withdrawal, while he may be proceeded against for contempt and his testimony is open to comment to the jury by reason of his conduct, he is not thereby disqualified * * *"

The court went on to say, obiter, that the exclusion of a witness under "the particular circumstances" might be allowed within discretion. There has been only this one case before the bar in which such an exclusion has been upheld in any part. There have been no federal cases involving such an exclusion, and the state cases hold uniformly that such exclusion is reversible error. *Palmer v. People*, 112 Ill. App. 527 (2nd Dist. 1903); *People v. Duane*, 21 Cal. 2d 71, 130 P. 2d 123; *Bibb v. State*, 107 Tenn. 532, 64 S.W. 476 (1901). The exclusion of a witness on this ground is error both in civil and criminal cases. *Holstein v. Green*, 262 S.W. 2d 954 (Tex. Civ. App.) (involving animals). *People v. Duane*, 21 Cal. 2d 71, 130 P. 2d 123 (involving liberty).

This case is important and suitable for the discretionary writ because the question of what to do when a witness violates the rule of sequestration in a federal court is one which is likely to arise from time to time, especially in long trials having many witnesses. To deprive a Defendant of two witnesses because they inadvertently came into the courtroom takes away his defense and deprives him of fundamental procedural due process of law, thereby contravening the due process clause of the Fifth Amendment to the Constitution of the United States. This is especially

true in a case where one half of the counts upon which convictions were had were reversed for insufficiency of proof. If six out of twelve convictions were that weak, then all of the competent, material and relevant evidence relating to the other counts should be heard before the entry of a judgment of conviction.

Further, the Government had the burden of establishing the existence of a scheme to defraud. The Defendant had a right to attack the existence of the scheme by introducing Krueger and Reed to contradict or clarify the testimony of the Government witnesses. The Appendix shows the extent to which they participated in the key conversations, and a new trial is sought at which they may testify.

The question as here presented is entirely novel as a federal question; never before has a matter been presented for review involving the exclusion of two-thirds of a defendant's case from the stand for violation of a rule that did not, by its express terms, apply to the witnesses in question. The Court of Appeals recognized the error and its gravity, but withheld full relief. This court should, we pray, consider the novelty of the case, and the injustice of depriving Defendant of his witnesses, and issue its writ.

CONCLUSION.

Defendant was deprived of two of his witnesses by a novel and highly technical ruling and his conviction was then held two-thirds defective by the Court of Appeals, which granted outright reversals of half the counts for insufficiency of proof. The case was close, and the Government's proof marginal on key issues. The exclusion of

Krueger and Reed made convictions where there should have been acquittals and was prejudicial.

The decision of the Court of Appeals could lead to great confusion and numerous appeals if used as a precedent for excluding witnesses from the stand for violation of the rule of exclusion, and it is subject to that construction. Defendant-Petitioner, prays that the writ of certiorari issue.

Respectfully submitted,

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APPENDIX A.

In the

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

No. 13278 SEPTEMBER TERM, 1961 JANUARY SESSION, 1962

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

CARL D. SCHAEFER,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

February 14, 1962

Before HASTINGS, *Chief Judge*, KILEY and SWYGERT, *Circuit Judges*.

SWYGERT, *Circuit Judge*. Defendant, Carl D. Schaefer, was indicted and convicted on seven counts of using the mails in the employment of a scheme to defraud in the offer and sale of securities proscribed by Section 17(a)(1) of the Securities Act of 1933, 15 U.S.C. 77q(a)(1), and on two counts of using the mails to deliver an unregistered security proscribed by Section 5(a)(2) of the Securities Act of 1933, 15 U.S.C. 77e(a)(2). He was sentenced to one year's imprisonment on each count, the first six counts to be con-

current with the last six for a total of six years, and was further sentenced to a fine of $1,000.00 on each count, for a total of $12,000.00 in fines. Defendant appeals primarily on the ground that the trial court, sitting without a jury, erred (1) in convicting on certain counts when there was no proof that defendant made misrepresentations to the investor involved in those particular counts, and (2) in preventing two of defendant's witnesses from testifying because of their presence in the courtroom after imposition of a rule requiring sequestration of witnesses. The pertinent facts follow.

Defendant claims he has invented a machine which can create steam with such small expenditures of energy that he believes it may eventually make atomic power obsolete. According to his assertions the steam is created by the action of shock waves in an enclosed body of water. The shock waves are set up by means of revolving plates which cause friction inside the water filled casing, thus turning the water into steam. Presumptively, the only need for energy is the power needed to rotate the plates and with this small energy requirement such a machine would be a most economical source of heat and power.

Many witnesses testified the machine did produce large quantities of steam when demonstrated at defendant's shop. However, a government witness testified to the effect that the steam was not hot. Defendant offered to demonstrate the capabilities of the invention in the courtroom but this was not allowed. The court accepted the government's position that the merits of the invention were not in issue since there was no charge that misrepresentations as to the operating characteristics and workability of the machine were a part of the scheme to defraud.

(Appendix)

The indictment sets forth twenty-two allegedly false representations comprising the scheme to defraud. None of the representations relate to the workability or the merits of defendant's steam-generating machine. The misrepresentations charged in the indictment as comprising the scheme consist of statements made to prospective investors in certain securities, to wit: "investment contracts and evidences of indebtedness relating to completing the development by the defendant of a machine for generating steam through hydraulic forces." The allegedly false statements include representations that a number of manufacturers, Dow Chemical Company, the du Pont company, Chrysler Corporation and/or the Monroe Aikens, among others, had formed a syndicate to purchase defendant's rights to his invention and had placed ten million dollars in escrow with the Chase National Bank in New York City; that Fairbanks Morse & Company and The Crane Company had each offered one million dollars for defendant's machine; and that the United States Navy was interested in buying defendant's machine.

The securities sold by these allegedly false representations consisted of contracts between the investors and defendant. By the terms of the contract the investor was assigned an interest, pro rata with other investors, in royalties and profits accruing to defendant as a result of the sale or lease of the patent rights to his invention. The investor's interest was limited to ten times his investment. When this ratio was reached the contract terminated. The contracts are securities within the meaning of the Securities Act of 1933, 15 U.S.C. 77b.

Defendant admitted during the Securities and Exchange Commission's investigation prior to his being indicted

that he had raised over $2,000,000 from several hundred investors. A number of these investors testified at the trial to misrepresentations and false pretenses made to them by the defendant. For example, defendant told one investor that the United States Navy wanted to buy his machine for millions of dollars and that a syndicate, interested in buying his machine, and consisting of Dow Chemical Company, Union Carbide Company, General Electric Company, General Motors Corporation, and the du Pont Company, had placed ten million dollars in escrow with the Chase National Bank of New York City on May 5, 1954, and that on November 6, 1954, this money would be transferred to an account at the Bank of Wilmette where it would be paid out to investors at the ratio of $10.00 return for every $1.00 invested after deducting $2,500,000 for payment to the government as taxes.

To another investor defendant represented that The Crane Company had offered him one million dollars for his invention and to others that Fairbanks Morse & Company had offered a like amount for his machine. To other prospective investors defendant said that the United States Navy had approved his machine and was going to use it in submarines; that General Electric Company or Western Electric Company wanted to buy his machine; that General Motors Corporation wanted to buy his machine for millions of dollars; that a syndicate was to pay five million dollars down payment to defendant for his invention and that in a few months from June, 1954, the investors would be repaid $10.00 for every $1.00 they had invested.

A stipulation was signed by defendant during the trial that, if called, the testimony of various company officials and persons about whom representations were made by

defendant would be as follows: The Chase Manhattan Bank had never heard of defendant, his machine, or any escrow agreement relating thereto; Chrysler Corporation, General Motors Corporation, Dow Chemical Company, and E. I. du Pont de Nemours & Company had never entered into dealings with defendant nor placed money in escrow to purchase a machine from defendant; the United States Navy had not heard of defendant nor dealt with him; and General Electric Company, Fairbanks-Morse, Western Electric, and The Crane Company had no contact with defendant and knew nothing of his machine.

Defendant's answer was that he did not make the misrepresentations or, if he did, he had relied on what others told him without checking the accuracy of the reports. This ignorance of facts is unavailing as a defense "where the defendant, by the exercise of due diligence, could have become aware of his mistakes, especially where others may suffer a loss by his misstatements." *Stone* v. *United States*, 6 Cir., 143 F. 2d 70, 75.

Defendant complains the scheme was established primarily by testimony of victims who are not mentioned in the counts. This argument has been answered in *Frank* v. *United States*, 10 Cir., 220 F. 2d 559, 563, where the court said, "Since it is the use of the mails in furtherance of the fraudulent scheme that is prohibited rather than fraud upon any recipient of material sent through the mails, the testimony of a victim is admissible to prove the scheme to defraud even if there has been no use of the mails in defrauding that party." Thus, the existence of a fraudulent scheme was properly shown and the evidence was ample to prove its existence.

(Appendix)

The crucial question is whether the government proved as charged in counts one to ten that defendant employed this scheme in the sale of the "ten for one" contracts by the use of the mails.

Clearly it is only when the mails are used in employing the scheme that the scheme becomes a federal crime. The use of the mails need not be central to the scheme but may be entirely incidental. *United States* v. [illegible]*shin*, 2 Cir., 281 F. 2d 669, and the mail need not contain fraudulent representations. *Cressmill-Keith, Inc.* v. *Willingham*, 8 Cir., 264 F. 2d 76.

Nevertheless, we hold that in order to sustain a conviction the government must show some impact of the scheme on the investor and that the mails were used in those instances where the impact occurred. To state our holding differently, even though a scheme to defraud in the sale of securities may have been devised and have been operative on certain investors, if a sale of these same securities would be legal absent the employment of the scheme and if the sales to those investors in which the use of the mails are charged is not tainted by the employment of the scheme, no offense has been proved. The statute is clear in this regard: the mail must be used *in employing* the scheme however incidental the mailing may be.

In the instant case the government contends the crime is established even though none of the alleged misrepresentations were made to the investors named in some of the counts. With this we cannot agree. The government has not challenged the workability of the machine and would not agree to its demonstration in court. Thus, we are forced to assume that any representations made as to the merits of the machine were not false. The investors

fall into two classes: those to whom a fraudulent scheme was employed by way of misrepresentations as to financial backing and those to whom no such misrepresentations were made and who invested solely on the represented merits of the machine. In this case misrepresentations as charged in the indictment were essential in order to establish that the victim was one to whom the scheme was applied. If the machine itself were charged to be fraudulent and this had been proved, conviction on all counts would stand. Since this was not the charge, we must examine the evidence in the light of the foregoing analysis.

Conviction on counts one and ten of the indictment must be set aside since the government admitted no misrepresentation had been made to the investor Danielson and thus no connection has been established between the scheme and the alleged victim. Counts two, eight, and nine, involving investor Schmeling, and count seven, involving investor Lund are similar in that as far as can be determined from the record, representations which were made concerned defendant's opinion as to the capabilities of the machine. Schmeling said patents were mentioned but this is insufficient to show it was represented that patents had been obtained. Accordingly, conviction on counts two, seven, eight and nine also must be set aside.

Conviction on counts three, four, five, and six fall in a different category. Sufficient misrepresentations of the financial support behind the machine were made to investors Cohen and Dickinson to bring them in contact with the scheme and the later mailing, although containing no misrepresentations, was incidental to the scheme. It is of no consequence that both investors stated they invested solely on demonstrations of the machine. Counts four and five

are similar in that investors Strege and Ito are both residents of California and their only contact with defendant was by way of correspondence with one Turney who contacted them on behalf of defendant. Since Turney testified he had passed misrepresentations made to him by defendant on to both Strege and Ito and that defendant knew he was contacting the alleged victims and approved, there is evidence of a connection between the scheme and the investors who mailed the money to defendant.

In regard to counts eleven and twelve, undeniably the contracts which were mailed to investors Stieve and Schmeling were securities within the meaning of the Securities Act of 1933, 15 U.S.C. 77b, and they were admittedly unregistered. Defendant's only contention is that he acted in good faith on the advice of his lawyer thereby negating the element of criminal intent. Defendant's testimony is to the effect that his lawyer informed him the contracts did not have to be registered. The lawyer did not say the contracts were not securities. The law in this regard was well put in *Linden v. United States*, 4 Cir., 254 F. 2d 560, 568, a mail fraud case. The court stated:

> "That the defendants proceeded under advice of a lawyer is a fact to be considered together with other facts in determining the question of defendant's good faith, but legal advice does not under all circumstances constitute an impregnable wall of defense. . . . To hold otherwise would be to say that no matter how violative of law a defendant's conduct may be and regardless of consciousness of wrongdoing on his part . . . the advice of counsel is immunity."

In the instant case, defendant's conduct in devising the fraudulent scheme must be considered in determining

whether he wilfully failed to register the securities. It hardly seems likely that he would register the securities if he were selling pursuant to a fraudulent scheme. Accordingly, we hold that the evidence was sufficient for the District Court to find a violation of 15 U.S.C. 77e(a)(2) as charged in counts eleven and twelve.

We come now to the question whether the trial judge abused his discretion in refusing to allow defendant's witnesses Krueger and Reed to testify. In the interest of brevity, we deem it sufficient to state that after a thorough study of the record we are convinced these witnesses were in the courtroom in violation of the court's order of sequestration. However, it appears that they did not wilfully violate the rule; likewise, there is no indication that their presence was with the consent, connivance, or knowledge of defendant or his counsel.

The most pertinent federal case which has been cited to us or which we have been able to locate is *Holder v. United States*, 150 U.S. 91, 92. In *Holder* the Supreme Court held:

> "If a witness discloses the order of withdrawal, while he may be proceeded against for contempt and his testimony is open to comment to the jury by reason of his conduct, he is not thereby disqualified, and the weight of authority is that he cannot be excluded on that ground merely, although the right to exclude under particular circumstances may be supported as within the sound discretion of the trial court."

The government cites several federal cases that are to the authority for the proposition that the decision whether to put the rule into effect is within the discretion of the court. They do not deal with the question of disqualification as a result of disobedience of the rule.

(Appendix)

There are decisions which hold that it is within the trial court's discretion to allow a witness who has disobeyed the rule to testify. *Coates* v. *United States*, 9 Cir., 59 F. 2d 173; *People* v. *Gifford*, 151 N.Y. Supp. 2d 980. It may be reasoned logically that the discretion cuts both ways. However, we interpret *Holder* to mean the court may not disqualify the witness merely because he disobeys the rule but that this alternative is available if particular circumstances are shown. From the better reasoned state court decisions we interpret these particular circumstances to mean some indication the witness was in court with "the consent, connivance, procurement or knowledge of the appellant or his counsel." *Holstein* v. *Grier*, Tex. Civ. App., 262 S.W. 2d 954; see also *People* v. *Tanner*, 77 Cal. App. 2d 184, 175 Pac. 2d 26, and 6 Wigmore, *Evidence* (1842, Supp. at 120. Sequestration of witnesses is a great aid in eliciting the truth, but disqualification of the offending witness absent particular circumstances is too harsh a penalty on the innocent litigant. Accordingly, we hold it was error to exclude the witnesses from the stand.

The government argues that if it were error it is not reversible error since no offer of proof was made. Answering this contention, we hold that if the record sufficiently reveals that the excluded witness' testimony would have been relevant in resolving a material issue of fact in the case, then an offer of proof was unnecessary to show prejudicial error. *People* v. *Dunne*, 21 Cal. 2d 71, 130 P. 2d 123. But the corollary proposition is also true: If there is insufficient revelation in the record or if there is doubt, then in order to take advantage of the error it was defendant's duty to make an offer of proof so as to apprise the trial court as well as the reviewing court as to the relevancy and materiality of the excluded testimony. Accord-

ingly, in order to determine the question of prejudicial error, it becomes necessary to examine the record with the foregoing propositions in mind. This we have done and our conclusions follow.

Defendant testified that some of the misrepresentations regarding the financial interest of the Navy and large private corporations in his steam generating machine had their origin in what others had told him while Krueger or Reed was present. Whether this testimony would have been corroborated by Krueger and Reed is immaterial because of our view that defendant's claimed reliance on what others may have told him about the financial backing for his machine is unavailing as a defense in the absence of any effort by him to check the accuracy of such representations.

Whether it was prejudicial error to bar the testimony of Krueger and Reed with specific reference to counts one, two, seven, eight, nine and ten is immaterial since conviction on these counts must be set aside for reasons already stated. With respect to counts three and six, we conclude that there was no showing that either Krueger or Reed was present when the misrepresentations were alleged to have been made. Thus, it is not obvious from the record that their testimony would have been relevant and material. An offer of proof was therefore essential.

The record shows with respect to counts four and five that Krueger may have been present during several conversations between defendant and Turney. It was during these conversations that defendant allegedly made false statements pertaining to the financial backing of his invention and statements regarding Turney's authority to solicit contracts. Defendant denied he had any knowledge or reason

to believe that Turney was writing anyone concerning the machine, and stated he had never authorized Turney to make representations concerning the machine. It thus appears from the record that Krueger's testimony was relevant and material because of the discrepancy in the testimony of defendant and Turney. Therefore, the error in failing to permit Krueger to testify was prejudicial as to counts four and five.

Defendant's testimony permits the inference that Reed was present when he was advised by Reed's lawyer that the securities need not be registered. Since we have already determined that defendant's allegedly good faith in relying upon the advice of counsel is not a defense with respect to these two counts, the error in not permitting Reed to testify with regard to the advice given by the lawyer was harmless. There was no offer of proof to indicate in what other respect Reed's testimony might have been relevant and material.

Defendant further contends that the trial court erred in limiting the cross-examination of the government witness, Bernier. We have considered defendant's arguments and find that they are without merit.

Also without merit is defendant's contention that the trial court erred in refusing to allow him to prove the excellence of his machine. We adopt the following language from the government's brief: "* * * the indictment *nowhere* charges any misrepresentation which involves the merits of the alleged steam generating machine of the defendant, and the government introduced no proof at the trial that the steam machine did not work." Since the excellence of the machine was not in issue, no purpose would have been served had the defendant attempted to demonstrate it.

(Appendix)

The judgment entered by the District Court convicting defendant on counts one, two, seven, eight, nine, and ten is reversed. The judgment convicting defendant on counts four and five is reversed and remanded for a new trial. The judgment convicting defendant on counts three, six, eleven and twelve is affirmed.

HUFSTEDLER, *Chief Judge*, concurring in part and dissenting in part.

I concur in that part of the majority opinion affirming defendant's conviction on counts eleven and twelve.

I concur in the result reached by the majority in affirming defendant's conviction on counts three and six.

I respectfully dissent from that part of the majority opinion resulting in the reversal of defendant's conviction on counts one, two, seven, eight, nine and ten.

The majority reversed defendant's conviction on counts one, two, seven, eight, nine and ten because no representations as to financial backing were made to the investors named in those counts. The crux of this holding is that the scheme extends only to those investors who felt the impact of the misrepresentations as to financial backing. The majority has split a single, integrated course of conduct into two separate courses of conduct by deciding that there were in reality two schemes—one legal, the other fraudulent. Such is not the law, and the majority cites no case in support of this particular holding.

In order for the scheme to come within the terms of the statute, it is not necessary that the victim be deceived, and the scheme to defraud may exist although no misrepre-

sentation of fact is made. *Henderson* v. *United States*, 6 Cir., 202 F. 2d 400, 404 (1953), cert. denied, 349 U.S. 920; *Boldroff* v. *United States*, 9 Cir., 202 F. 2d 389, 391 (1953). Furthermore, unlike common law fraud it is not necessary under the statute that any victim actually be defrauded. *United States* v. *Silvanus*, 7 Cir., 192 F. 2d 96 (1951), cert. denied, 342 U.S. 943.

It is not necessary to show that the entire course of the transaction was a fraud. In *Stephens* v. *United States*, 9 Cir., 41 F. 2d 440 (1930), cert. denied, 282 U.S. 889, certain aspects of the defendants' business were perfectly legal, and the defendants claimed that the mailings charged were in furtherance of the lawful aspects of their business. The court stated:

> "In respect of the question whether such use of the mails was in the 'execution' of the 'scheme' to defraud, defendants' position is, in the main, that the business conducted by them is not shown to have been wholly fraudulent, in all of its branches, and that the mailings were made in the promotion of the lawful features, or at least that the evidence fails to show any connection with those branches which were promoted by deception and false pretenses. But direct connection was not requisite. The business was a single general enterprise, and a lawful activity in the course thereof might very well have made a material contribution to the success of another activity illegitimate in its purpose or fraudulent in the means used in carrying it forward. * * * If fraudulent in important and continuing branches of its activities, the enterprise as a whole may properly be characterized as a fraudulent scheme." *Id.* at 447.

It is the clear holding of *Stephens* that the fraudulent aspects of an enterprise taint the entire enterprise. The

majority opinion appears to be directly to the contrary when it states that "even though a scheme to defraud in the sale of securities may have been devised and have been operative on certain investors, if a sale of these same securities would be legal absent the employment of the scheme and if the sales of those investors in which the use of the mails are charged is not tainted by the employment of the scheme, no offense has been proved."

The majority's holding reversing the conviction on these counts, without precedent, in my opinion is an unwarranted doctrine based upon a theory that runs counter to the rationale of all holdings brought to our attention. I would affirm defendant's conviction on counts one, two, seven, eight, nine and ten.

I respectfully dissent from the majority holding that it was error to exclude the witnesses Krueger and Reed from the stand and in refusing to allow them to testify.

At the outset, it is important to examine the record relating to the exclusion order itself. At the opening of the trial and before any witnesses had testified, the court inquired, "Is there a motion to exclude?" Defendant's counsel, Mr. Grant, replied, "Yes, your Honor." Pursuant to the Government's request, Thomas Howard, a representative of the Securities and Exchange Commission, was permitted by the court to sit and participate with the Government. The court then announced in open court the following rule:

> "Any and all witnesses in the case of the United States of America versus Carl D. Schaefer who are in the courtroom are asked to leave the courtroom and go to the witness room which is just back of the court room."

(Appendix)

This was a trial to the court, without the intervention of a jury. The motion to exclude the witnesses was made by defendant, not the Government.

During the trial, defendant called Krueger as a witness on his behalf. When it was brought out by defendant's counsel that the witness had been present in the courtroom during the course of the trial when testimony was being given, the Government objected to his testifying. The witness was examined by counsel for both sides and by the court. Krueger admitted being present in court "twice" while witnesses were testifying. Government counsel stated that, "now that I know who he is," he had seen him in the courtroom "at least three times" and "in the corridor outside of the courtroom on numerous occasions during the trial." The record shows that the following then took place:

"The Court: The motion to exclude will be allowed.

"Mr. Grant (defendant's counsel): Then I assume you mean, Judge, that the objection to this witness testifying is sustained?

"The Court: That is right, it will be sustained in that he has been present during the trial of the case.

"Mr. Grant? All right. Step down.

"The Court? Step down, sir. That is all."

Other than to make a statement during a colloquy while Krueger was on the stand that "I think the testimony he is going to give would not have been pertinent to the testimony given by any Government witness, and that perhaps the rule shouldn't apply," defendant's counsel made no offer of proof, no showing as to what the witness would

tion unless it finds the latitude given a trial judge to have been clearly abused with prejudicial results.

Defendant's witnesses were excluded on his own motion. One would have to be naive indeed to believe that neither defendant nor his counsel did not know that Krueger was sitting in the courtroom or loitering in corridors in violation of the exclusion rule. Since defendant invoked the rule he had a compelling duty to see that his witnesses obeyed and to advise the court promptly of such disobedience.

It is to be noted that neither defendant nor his trial counsel ever represented to the court that they had no knowledge of Krueger's presence in the courtroom in violation of the exclusion rule.

Assuming that defendant did not know Kruger had violated the rule when called to testify, when the Government properly questioned the propriety of his testifying, under the circumstances of this case, the defendant had a positive duty to inform the trial court concerning the nature and relevancy of the proffered testimony; if not by formal offer of proof, then at least in some informal manner. Instead, defendant merely stated that such testimony would not be pertinent to the testimony given by the Government's witnesses.

Now, on appeal, defendant would have us search the cold record and guess what Krueger might have testified to and then guess again as to its relevancy and then hazard a finding that this was all material to defendant's conviction. This is a tortuous route on which to find a gross abuse of discretion.

It is to be noted with commendation that the majority finds no prejudicial error in the exclusion of the witness

(Appendix)

Reed's testimony. We, therefore, have no need to consider further the rejection of his testimony. Further, with the foregoing single exception, there was no finding of prejudicial error as to Krueger's excluded testimony. These findings of lack of prejudicial error are based on the immateriality or irrelevancy of such proffered testimony or the failure to make an offer of proof. I think the court errs today in making this single exception. It is not enough to say that "Krueger may have been present during several conversations between defendant and Turney."

This was a bench trial before an able and experienced trial judge. He could best gauge the purport of his action. We may disagree with his ruling. We may have ruled to the contrary had we sat in his place. But we may not substitute our judgment for his. We may set aside his judgment on a clear showing of gross abuse of discretion resulting in prejudicial error. I do not find that present in the record in this case. I would affirm the judgment of conviction on counts four and five.

In conclusion, I would affirm the judgment of conviction on all counts."

APPENDIX B.

Places in the Record where Krueger and Reed are referred to in the evidence.

Krueger	*Reed*
Page	
7	265
11	296
20	303
31	304
39	311
40	312
41	319
42	323
43	324
44	325
52	327
60	328
106	339
120	340
154	341
165	342
187	349
192	353
198	356
202	358
208	359
213	363
218	364
219	365
263	366
387	367
388	368
389	369

(Appendix)

Krueger		*Reed*
Page		
400		518
401		519
440		528
510		529
513		533
514		534
515		555
518		558 (3 times
520		613
533 (5 times)		615
534 (2 times)		616
579 ("Schaefer's helper).		616
590 ("Schafer's helper).		628
707		632
725		637
732		725
747		774
932		776
937		777
949		778
968		944
982		965
1000		978
		1002
		1025

APPENDIX C.

Name of Witness Used to Establish Scheme of Defraud	Appendix References—Reed or Krueger as Indicated.
Fojtik	Reed—150
Guenther	Krueger—116
Proulx, Arthur A.	Reed—101
Proulx, Babe June	Reed—109
Robinson	Krueger—140, 141, 142 & 145
Schmeling	Reed—142, 144 & 145
Schwind	Krueger—59 & 64
Stieve	Reed—163
Swanson	Krueger—77
Reinmueller	128 (neither)
Stashwick	155 (neither)
Miller	67 (neither)

APPENDIX D.

Constitution of the United States Amendment (V.)

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.